

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
MAR 27 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0301-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
WALTER J. VAN, JR.,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-52748

Honorable Michael O. Miller, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Walter James Van, Jr.

Buckeye
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner Walter James Van, Jr. seeks review of the trial court’s denial of relief on a successive petition for post-conviction relief Van filed pursuant to Rule 32, Ariz. R. Crim. P., challenging the propriety of his sentences. We will not disturb a trial court’s denial of post-conviction relief unless the court clearly has abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). No such abuse occurred here.

¶2 Van was sentenced in 1996 to four concurrent prison terms, the three longest for twenty-eight years, after a jury had found him guilty of armed robbery, kidnapping, first-degree burglary, and aggravated assault. The trial court imposed aggravated sentences, which were also enhanced because Van had at least two historical prior felony convictions and had committed these offenses while he was on release from an earlier conviction. We affirmed his convictions and sentences on appeal more than a decade ago. *See State v. Van*, No. 2 CA-CR 96-0550 (memorandum decision filed Jan. 29, 1998).

¶3 Van has since filed at least three unsuccessful petitions for post-conviction relief and two previous petitions for review. *See State v. Van*, No. 2 CA-CR 2002-0394-PR (memorandum decision filed Apr. 25, 2003); *State v. Van*, No. 2 CA-CR 2000-0291-PR (memorandum decision filed Dec. 21, 2000). In his latest petition for post-conviction relief,¹ Van contended that he was improperly sentenced pursuant to former A.R.S. § 13-702.01(I)²

¹Although Van captioned the petition a petition for writ of habeas corpus, the trial court correctly treated it as a petition for post-conviction relief pursuant to Rule 32.

²Significant portions of Arizona’s criminal sentencing code recently have been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective “from and after

and that his historical prior felony convictions were counted twice to enhance and then aggravate his sentences, resulting in the imposition of illegally enhanced sentences.

¶4 In ruling on Van’s petition below, the trial court first rejected as factually incorrect Van’s claim that he had been improperly sentenced pursuant to § 13-702.01 without having received the advance notice required by § 13-702.01(I). Instead, the court found, it had not sentenced him pursuant to § 13-702.01 at all but, rather, pursuant to former A.R.S. § 13-604(D), based on Van’s previous felony convictions. The transcript of Van’s sentencing hearing confirms that, although the court and counsel did discuss § 13-702.01 before sentence was pronounced, the court specifically declined to impose the substantially aggravated sentences authorized by that statute.³ The court rejected Van’s second post-conviction claim on the grounds that his historical prior felony convictions had not been “counted twice” and that Van was not entitled to sentencing relief under *Blakely v. Washington*, 542 U.S. 296 (2004), and Rule 32.1(g) (significant change in the law).

¶5 Although the trial court’s analysis of Van’s claims appears substantively correct, we must also note that his convictions became final upon the issuance of our mandate in his appeal in September 1998, and the claims raised in his “petition for habeas

December 31, 2008.” *Id.* § 120. In this decision, however, we refer to the statutes as they were numbered at the time of Van’s sentencing.

³As discussed in our memorandum decision on Van’s appeal, he was also sentenced pursuant to former A.R.S. § 13-604.02, which requires him to serve these sentences day-for-day because he committed the new offenses while on release from a previous conviction. *Van*, No. 2 CA-CR 96-0550, ¶ 9.

corpus”—his third post-conviction proceeding following his appeal—were precluded. *See* Ariz. R. Crim. P. 32.2(a). For both substantive and procedural reasons, therefore, the trial court did not abuse its discretion in denying relief. Accordingly, although we grant the petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge